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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Inquiry Concerning the Deployment of)
Advanced Telecommunications)
Capability to All Americans in a)
Reasonable and Timely Fashion,)
and Possible Steps to Accelerate)
Such Deployment Pursuant to)
Section 706 of the)
Telecommunications Act of 1996)

CC Docket No. 98-146

COMMENTS OF TIME WARNER CABLE

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ATTORNEYS FOR TIME WARNER
CABLE

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COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("TWC") hereby submits its comments in response to the Commission's Notice of Inquiry in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

In the Notice of Inquiry, the Commission has commenced its review of the level and rate of deployment of advanced telecommunications capabilities as required by Section 706(b). That provision requires that the Commission determine whether advanced telecommunications capabilities are being deployed in a "reasonable and timely fashion." As the Commission recognizes,

¹ See Inquiry Concerning the Deployment of Advanced Telecommunications Capability, CC Docket 98-146, Notice of Inquiry (rel. Aug. 7, 1998) ("Notice of Inquiry").

Section 706 does not contemplate any FCC action unless and until the FCC determines that deployment is not taking place in a reasonable and timely fashion.

The conclusions the Commission reaches in this proceeding will have far-reaching implications for the communications industry specifically and the U.S. economy generally. The Commission must therefore conduct its inquiry under Section 706 in the most thorough and disciplined manner possible. As a critical preliminary matter, this requires that the Commission focus on the optimal procedures for building a reliable factual record. Once those procedures have been established, the Commission should subject that record to rigorous scrutiny.

If the Commission ultimately concludes that the pace of advanced services deployment is not reasonable or not timely, further Commission action must be guided by two important principles. First, Section 706 is not an independent grant of jurisdiction, and the FCC may only promote advanced services deployment to the extent permitted by specific provisions of the Communications Act. Second, any action taken to advance the goals of Section 706 must be deregulatory in nature.

I. THE COMMISSION MUST STUDY THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITIES IN A DISCIPLINED AND DETAILED MANNER AND SHOULD ATTEMPT TO ENCOURAGE INVESTMENT ONLY IF IT CAN MEET THE HEAVY BURDEN ESTABLISHED IN SECTION 706.

Section 706 of the Telecommunications Act of 1996 requires the Commission to commence an "inquiry" in which it shall "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." At the conclusion of its inquiry, if the Commission determines that the "reasonable and timely" standard has not been met, it must "take immediate action to accelerate deployment" of advanced services.

Thus, as the Commission has recognized, Section 706 establishes a requirement that the FCC may not intervene in the advanced service marketplace unless the Commission can demonstrate that advanced services are not being deployed in a "reasonable and timely fashion." Such a conclusion can only be supported by a detailed and disciplined fact-based study of the advanced services marketplace. Once there is an adequate factual predicate, the Commission should conduct a rigorous review to determine whether there is any structural economic failure preventing deployment of the services in question.

This approach makes good policy sense. It reflects Congress' recognition that the tremendous growth in the use of advanced services related to the Internet has taken place because government has not regulated the Internet. Indeed, as the Notice

of Inquiry suggests, there is already a great deal of investment in infrastructure that is or will soon be used to provide advanced services. No doubt the comments in this proceeding will further elaborate on this issue.

For its part, TWC and the rest of the cable industry have made the deployment of high-speed Internet access and content a top priority. TWC's Road Runner service is an important example.² Road Runner offers subscribers on-line content along with high-speed access to the Internet delivered over the cable plant. The comments of NCTA in this proceeding provide a full description of this and other similar services provided by cable operators.

In light of the great promise that private investment, unfettered by regulation, holds in this area, the Commission should take the time to conduct a thorough and disciplined analysis of advanced services deployment. In addition to the comments received in response to the Notice of Inquiry, the Commission might, for example, survey potential participants in the advanced service marketplace. In this way, the Commission can collect data in a manner that is useful, comprehensive and reliable.

Perhaps the most helpful model for such a survey is the manner in which the Commission collects data for the annual

² Road Runner is jointly owned by TWC, MediaOne Group, Advance/Newhouse, Microsoft Corp., and Compaq Corp.

report required by Section 623(k) on cable service and equipment rates.³ In order to gather the information required for that report, the Commission has established a detailed questionnaire that certain cable operators must complete.⁴ This approach is necessary in light of the detailed analysis of cable service and equipment rates required by Section 623(k). Similarly, Section 706 requires a detailed examination of the level and pace of advanced services deployment.

In sum, the Commission should not attempt to assess the level and pace of advanced services deployment until it has conducted a thorough and disciplined analysis of the factual record. The Notice of Inquiry is only one step in that process.

³ Section 623(k) provides as follows: "The Commission shall annually publish statistical reports on the average rates for basic cable service and other cable programming, and for converter boxes, remote control units, and other equipment of --

(1) cable systems that the Commission has found are subject to effective competition under section (a)(2) [of section 623], compared with

(2) cable systems that the Commission has found are not subject to such effective competition."

⁴ See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-266. Order (rel. June 16, 1997) (adopting a survey to be distributed to a random sampling of cable operators). While the Commission requires only a random sampling of cable operators to fill out the Section 623(k) form, it might be appropriate in the Section 706 context to ask all relevant industry players to fill out a form on the deployment of advanced services.

II. THE COMMISSION MAY PROMOTE THE DEPLOYMENT OF ADVANCED SERVICES ONLY TO THE EXTENT PERMITTED BY THE SPECIFIC PROVISIONS OF THE COMMUNICATIONS ACT.

As explained, the Commission has justifiably indicated that a great deal of work must be completed before any affirmative attempt to encourage investment in advanced services would be warranted. But it is also important to emphasize that any such attempt would be constrained by the terms of the Communication Act. Section 706 does not constitute an independent grant of regulatory authority to the Commission. Rather, Section 706 permits the FCC to act only to the extent that other provisions of the Communications Act permit.

The Commission has recognized this fact. For example, in the Order in the FCC's companion Section 706 proceeding, the Commission held that the reference to "regulatory forbearance" in Section 706(a) is merely a reference to the forbearance power granted to the Commission under Section 10 of the Communications Act.⁵ As the Commission explained,

[W]e agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods. Rather, we conclude that section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.⁶

⁵ See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking (rel. Aug. 7, 1998).

⁶ See id. at ¶ 69.

While this conclusion was reached in the context of BOC requests for forbearance from Sections 251 and 271, its implications extend to all actions taken to promote the goals of Section 706. Section 706 does not grant the FCC the authority to disregard the discrete regulatory models applicable to telecommunications, cable, broadcast etc. The Commission recognized this fact in the Notice of Inquiry where it stated that "Congress, when it enacted the Act, created or retained these [regulatory] models and thereby endorsed their continued use."⁷

Nor may the Commission, on its own, seek to exceed the limits placed on its authority in the Communications Act. Administrative agencies possess only the authority granted to them by Congress.⁸ Only Congress can or should consider making wholesale changes to existing law. In any case, the Communications Act reflects Congress' judgment that the goal of Section 706 is to operate within the existing legal framework for FCC regulation.

⁷ See Notice of Inquiry at ¶ 77.

⁸ See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("An agency may not confer power upon itself").

III. ANY MEASURES ADOPTED TO ADVANCE THE SECTION 706 GOAL OF DEPLOYMENT OF ADVANCED SERVICES MUST BE DEREGULATORY IN NATURE.

Finally, any action ultimately taken to promote the goals of Section 706 must be deregulatory in nature. Neither the terms of Section 706 nor sound policy supports the introduction of further regulation to promote deployment of advanced services.

Section 706 requires that the FCC focus any action taken to promote deployment of advanced telecommunications capabilities on the removal of "barriers to infrastructure investment."⁹ This approach is fundamentally deregulatory. Firms are much more likely to invest in "infrastructure" (i.e., their own facilities) if they are relieved of undue regulatory burdens. The imposition of further regulation, on the other hand, would undermine firms' incentive to invest in their own facilities.

The specific regulatory mechanisms suggested in Section 706(a) for the elimination of barriers to investment in infrastructure further confirm the view that Congress intended that Section 706 would spur deregulation. Most importantly, Section 706(a) lists regulatory forbearance as a mechanism for

⁹ Section 706(a) states that the Commission should, if necessary, use "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Section 706(b) states that the Commission, again if necessary, should "accelerate deployment of [advanced telecommunications capability] by removing infrastructure investment and by promoting competition in the telecommunications market."

encouraging advanced services deployment. Forbearance obviously involves the removal of regulation rather than the introduction of further regulation.¹⁰

More broadly, it is important to recall that Section 706 is one of the centerpieces of Congress' stated goal in passing the 1996 Act: "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies."¹¹ Moreover, Section 706 has important implications for the Internet. In Section 230 of the 1996 Act, Congress established that "[i]t is the policy of the United States -- (1) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State regulation."¹² Congress plainly did not want implementation of Section 706 to undermine this policy.

Indeed, as mentioned, the most obvious and important example of the success of deregulation in spurring investment and innovation is the Internet itself. The FCC's treatment of enhanced/information services (including the provision of

¹⁰ See 47 U.S.C. § 160 (Section 10 of the Communications Act) (listing the criteria for the exercise of the FCC's forbearance power).

¹¹ S. Conf. Rep. No.104-230, at 1 (1996).

¹² See 47 U.S.C. § 230(b)(2).

Internet access) as unregulated¹³ has been enormously successful. There is no reason to think that a similar hands-off approach to advanced services would not be equally successful.

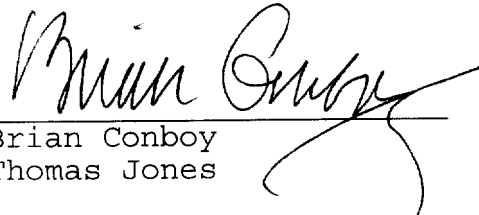
¹³ See In the Matter of MTS and WATS Market Structure, Memorandum Opinion and Order, 9 FCC 2d 683, 711-722 (1983).

CONCLUSION

The Commission has recognized that it must determine whether advanced telecommunications capabilities are being deployed in a "reasonable and timely fashion." In order to make this determination, the Commission must develop a reliable fact-based record of advanced service deployment. One possible means of developing such a record is to conduct a survey of firms participating in the advanced services market(s).

If the FCC ultimately determines it must take action to advance the goals of Section 706, two principles must guide such action. First, since Section 706 is not an independent grant of jurisdictional authority, regulatory action can be taken only to the extent explicitly permitted by other provisions of the Communications Act. Second, Section 706 contemplates that any such action be deregulatory in nature.

Respectfully submitted,



Brian Conboy
Thomas Jones

WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
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